

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 KAY ECKLER, On Behalf of Herself and
12 All Others Similarly Situated,

13 Plaintiff,

14 vs.

15 WAL-MART STORES, INC., a Delaware
16 Corporation,

17 Defendant.
18

CASE NO. 12-CV-727-LAB-MDD

**ORDER ON WAL-MART'S
MOTION TO DISMISS**

19 Kay Eckler bought a dietary supplement from Wal-Mart that, she alleges, didn't deliver
20 the benefits it promised. The supplement is Equate Glucosamine MSM Advanced Triple
21 Strength, which is marketed as good for the health and comfort of joints. Eckler asserts
22 claims for: (1) violations of California's Unfair Competition Law, Cal. Bus. and Prof. Code §
23 17200, *et seq.*; (2) violation of the California Consumers Legal Remedies Act, Cal. Civ. Code
24 § 1750; and (3) breach of express warranty.¹ Now pending is Wal-Mart's motion to dismiss
under Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6).

25 //

26 //

27 _____
28 ¹ Eckler's attorneys are also behind a virtually identical lawsuit against the
manufacturers of Osteo Bi-Flex in the Eastern District of California. Osteo Bi-Flex is the
brand name equivalent of Equate. See *Cardenas v. NBTY, Inc.*, Case No. 11-CV-1615.

1 **I. Legal Standard**

2 A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency
 3 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering such a
 4 motion, the Court accepts all allegations of material fact as true and construes them in the
 5 light most favorable to Eckler. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of*
 6 *U.S.*, 497 F.3d 972, 975 (9th Cir. 2007). To defeat a 12(b)(6) motion, a complaint's factual
 7 allegations needn't be detailed; they must simply be sufficient to "raise a right to relief above
 8 the speculative level" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However,
 9 "some threshold of plausibility must be crossed at the outset" before a case can go forward.
 10 *Id.* at 558 (internal quotations omitted). A claim has "facial plausibility when the plaintiff
 11 pleads factual content that allows the court to draw the reasonable inference that the
 12 defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
 13 "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than
 14 a sheer possibility that a defendant has acted unlawfully." *Id.*

15 While the Court must draw all reasonable inferences in Eckler's favor, it need not
 16 "necessarily assume the truth of legal conclusions merely because they are cast in the form
 17 of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.
 18 2003) (internal quotations omitted). In fact, the Court does not need to accept any legal
 19 conclusions as true. *Iqbal*, 129 S.Ct. at 1949. A complaint does not suffice "if it tenders
 20 naked assertions devoid of further factual enhancement." *Id.* (internal quotations omitted).
 21 Nor does it suffice if it contains a merely formulaic recitation of the elements of a cause of
 22 action. *Bell Atl. Corp.*, 550 U.S. at 555.

23 **II. "Lack of Substantiation" Claims**

24 The first question for the Court is whether Eckler's false advertising claims under the
 25 Unfair Competition Law and Consumers Legal Remedies Act are really just "lack of
 26 substantiation" claims. It's a problem if they are, because private litigants can't bring those
 27 claims. See *Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107

28 //

1 Cal.App.4th 1336, 1345 (Cal. Ct. App. 2003); *Stanley v. Bayer Healthcare LLC*, 2012 WL
 2 1132920 at *3 (S.D. Cal. Apr. 3, 2012).

3 There's no doubt that Eckler's claims draw heavily on the alleged lack of any scientific
 4 evidence that glucosamine is good for the body's joints. In the very opening of her
 5 complaint, for example, she states that "Equate does not support joint comfort, renewal and
 6 rejuvenation" and then continues, "Clinical cause and effect studies have found no causative
 7 link between the primary purported active ingredients in Equate and the prevention of joint
 8 degeneration or relief from joint discomfort. And, there are no competent or well-designed
 9 clinical studies that support Wal-Mart's joint comfort, renewal and rejuvenation
 10 representations." (FAC ¶ 2.) Translation: Equate's claims are unsubstantiated. That
 11 allegation seems to takes center stage in Eckler's complaint:

- 12 • Wal-Mart represents that the joint comfort, renewal and rejuvenation
 13 benefits are achieved from the combination of ingredients in the Product.
 14 The primary active ingredient in Equate is glucosamine hydrochloride
 15 There is no competent and reliable scientific evidence that taking
 16 glucosamine — let alone through oral administration — helps to "rebuild
 cartilage", "lubricate joints" or "support joint comfort". In fact, clinical
 cause and effect studies have found no causative link between
 glucosamine supplementation and joint comfort, renewal or rejuvenation.
 (FAC ¶ 13.)
- 17 • The Equate product also contains a Proprietary Blend consisting of [a list
 18 of ingredients] There is no competent scientific evidence that
 19 taking any of these ingredients — let alone through oral administration
 20 — has the ability to "rebuild cartilage", "lubricate joints" or improve joint
 21 comfort. In fact, clinical cause and effect studies have found no
 22 causative link between supplementation with any of the ingredients,
 23 alone or in combination, and joint comfort, renewal or rejuvenation.
 24 (FAC ¶ 14.)
- 25 • There are no competent and reliable scientific studies that support Wal-
 26 Mart's joint comfort, renewal and rejuvenation representations. Indeed,
 27 clinical cause and effect studies establish that Wal-Mart's joint comfort,
 28 renewal and rejuvenation representations are deceptive. For example,
 the National Institute of Health . . . concluded that "[g]lucosamine and
 chondroitin sulfate alone or in combination did not reduce pain
 effectively in the overall group of patients with osteoarthritis of the knee."
 (FAC ¶ 16.)
- For example, the National Collaborating Centre for Chronic Conditions
 reported "the evidence to support the efficacy of glucosamine
 hydrochloride as a symptom modifier is poor" and the "evidence for
 efficacy of chondroitin was less convincing." Consistent with its lack of
 efficacy findings, the NCCCC Guideline did not recommend the use of
 glucosamine or chondroitin for treating osteoarthritis. (FAC ¶ 18.)

- 1 • Scientific studies also confirm that the other ingredients in Equate are
2 ineffectual. (FAC ¶ 19.)
- 3 • Despite the scientific evidence that the ingredients in Equate do not
4 renew or rejuvenate joints or improve joint comfort and without
5 possessing any competent and reliable scientific evidence that the
6 Product works as advertised, Wal-Mart continues to convey through its
7 advertising and labeling one uniform message: Equate helps to “rebuild
8 cartilage”, “lubricate joints” and “support joint comfort” in all joints in the
9 human body, for individuals of all ages or for all stages of joint disease.
10 (FAC ¶ 20.)
- 11 • Specifically, Wal-Mart failed to disclose that Equate does not renew or
12 rejuvenate joints or improve joint comfort and well-conducted, clinical
13 cause-and-effect studies have found no causative relationship between
14 the active ingredients in Equate and the prevention of joint degeneration
15 or relief from joint discomfort. (FAC ¶ 22.)

11 Eckler accuses Wal-Mart of cherry-picking her allegations out of context to cast this as a “lack
12 of substantiation” case. There’s really no denying, though, that Eckler’s claims are based
13 almost exclusively on her allegations that the purported benefits of glucosamine either: (1)
14 are completely unsubstantiated by Wal-Mart; or (2) have been disproved by the scientific
15 community.²

16 But (1) and (2) aren’t necessarily the same thing—a point that Wal-Mart seems to miss
17 by conflating the above excerpts. There is a difference, intuitively, between a claim that has
18 no evidentiary support one way or the other and a claim that’s actually been disproved. In
19 common usage, we might say that both are “unsubstantiated,” but the caselaw (and common
20 sense) imply that in the context of a false advertising lawsuit an “unsubstantiated” claim is

21
22 ² The Court sees only one allegation, really, that goes beyond the substantiation
23 issue: Eckler claims that she took Equate and it didn’t do for her what she expected it to:
24 “The Product Plaintiff Eckler purchased did not rebuild her cartilage, lubricate her joints or
25 improve her joint comfort as represented.” (FAC ¶ 9.) Of course, how would she actually
26 know that? The health and comfort of joints is probably influenced by a number of variables.
27 Did Eckler keep all of them constant, adjust for ones that can’t be kept constant (like aging),
28 and then somehow have her cartilage and joints examined? Did she keep precise records
of how much Equate she took, why she took it, and just how long she took it for? Can she
document what her physical condition was before she and after she took Equate? Probably
not. What’s more likely is that she took Equate casually and just didn’t feel much better, but
that makes her own claims just as speculative as she alleges Equate’s benefits are. On the
other hand, Eckler can’t reasonably be expected to come forward with some rigorous
medical exam that shows Equate did her no good. That’s just the nature of the product at
issue; it’s really only scientific testing that can show a supplement’s claims to truly be false
and/or misleading.

only the former. For example, Wal-Mart cites *Chavez v. Nestle USA, Inc.* as a case in which a lack of substantiation claim was dismissed. See 2011 WL 2150128 (C.D. Cal. May 19, 2011). But the district judge in *Chavez* found that “Plaintiffs’ pleading has shifted from allegations of affirmative misrepresentations by Defendant . . . to essentially alleging that Defendants’ claims about its products are deceptive because they are unsubstantiated.” *Id.* at *1. That suggests a distinction between a claim about a product that has been disproved (which is closer to an affirmative misrepresentation) *and* a claim about a product for which there’s no proof at all (which is closer an unsubstantiated claim). Indeed, the judge construed the claim as a lack of substantiation claim because “Plaintiffs do not, for example, allege facts challenging the relationship of DHA and brain development, the role of Vitamin C and zinc in immune function, or of pre-biotic fiber in digestion Plaintiff has not articulated what about that claim is deceptive beside the fact that it is supposedly unsubstantiated.” *Id.* at *4. The Court sees this case a little differently. To the extent Eckler points to studies that allegedly debunk the purported benefits of glucosamine hydrochloride, she isn’t just saying those benefits are unsubstantiated. She is saying they are positively false.³ (See FAC ¶¶ 16–19.)

In light of the above, the Court simply doesn’t see this as a “lack of substantiation” case. If the complaint is to be dismissed, it must be deficient under Rules 8, 9(b), or 12(b)(6) of the Federal Rules of Civil Procedure.

//

//

³ This is also how the Court reads *Frank v. Bayer*, another case on which Wal-Mart relies. See 2009 WL 5865687 (E.D. Cal. Oct. 6, 2009). The *Frank* court recognized that a private plaintiff may bring a false advertising claim only “by pleading facts to support an allegation that Defendant’s advertising claims are *false or misleading*.” *Id.* at *8. Here, Equate purports to be good for the body’s joints. A study showing no connection between Equate’s active ingredients and joint health, however, is a fact that suggests Equate’s claims are false. Wal-Mart also relies on *Stanley*, but Judge Gonzalez treated that as a “lack of substantiation” case, as the Court reads her opinion, because the plaintiff’s experts could only say that the claims of the products at issue were *inconclusive*—not that they were false. 2012 WL 1132920 at *6. *Stanley* is therefore distinguishable from a case, like this one, in which plaintiffs point to studies that they claim actually disprove a product’s claims.

1 **III. Discussion**

2 It's best to start with the representations at issue. While Eckler's complaint
 3 incorporates screen shots of Equate's packaging, the Court finds it easier to read the color
 4 copy attached to Wal-Mart's motion to dismiss. Reading that copy from left to right, the Court
 5 identifies the following representations. First, "Glucosamine Chondroitin Complex is a
 6 synergistic combination of the latest in joint health ingredients, specifically designed for those
 7 individuals who are serious about protecting and maintaining their joint health." Second,
 8 "Glucosamine Chondroitin Complex has a proprietary blend of ingredients that support
 9 healthy joints." Third, "Glucosamine Chondroitin Complex helps protect cartilage and helps
 10 maintain the cellular components within joints." Fourth, it "Helps Protect Cartilage." Fifth,
 11 from the front of the box, Glucosamine Chondroitin is "[f]ormulated to help [s]upport joint
 12 comfort [and] [r]ebuild cartilage and lubricate joints." It is this fifth representation that Eckler's
 13 complaint focuses on.⁴ (See FAC ¶¶ 1, 12, 15, 20.)

14 **A. UCL Claim**

15 Eckler's first claim arises under California Business and Professions Code § 17200,
 16 *et seq.*, California's Unfair Competition Law. Unfair competition includes "any unlawful, unfair
 17 or fraudulent business act or practice." Cal. Bus. and Prof. Code § 17200. The section is
 18 written in the disjunctive, so it establishes three separate and distinct theories of liability.
 19 *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010). The definition of an
 20 unlawful business practice is straightforward: "anything that can properly be called a business
 21

22 ⁴ Eckler actually re-states the representation as the "joint comfort, renewal and
 23 rejuvenation representation," which imputes to Wal-Mart language it doesn't use. (See FAC
 24 ¶ 1.) She does the same, arguably, when she alleges that Wal-Mart "promises that Equate
 25 will help rebuild cartilage, lubricate joints and improve joint comfort for all joints in the human
 26 body, for adults of all ages and for all stages of joint disease." (*Id.*) The packaging does
 27 suggest, at a minimum, that Equate is good for the shoulder, wrist, elbow, hip, and knee
 28 joints; a picture of a human body on the packaging calls attention to these areas specifically.
 It's less clear to the Court that merely claiming a product supports joint comfort, rebuilds
 cartilage, and lubricates joints suggests it provides benefits to all persons and for all stages
 of joint disease—especially when a disclaimer on the packaging says, very clearly, that
 Equate "is not intended to diagnose, treat, cure, or prevent any disease." So, for purposes
 of this motion to dismiss, the representation at issue is the actual representation on the
 Equate box that it is formulated to "help . . . [s]upport joint comfort [and] [r]ebuild cartilage
 and lubricate joints."

1 practice and that at the same time is forbidden by law.” *Cel-Tech Commc’ns, Inc. v. Los*
 2 *Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). A fraudulent business practice is also
 3 straightforward: “one in which members of the public are likely to be deceived.” *Morgan v.*
 4 *AT&T Wireless Servs., Inc.*, 177 Cal.App.4th 1235, 1254 (2d Dist. 2009) (internal quotations
 5 omitted). *See also Paduano v. American Honda Motor Co., Inc.*, 169 Cal.App.4th 1453, 1469
 6 (4th Dist. 2009). The definition of an unfair business practice is more elusive. One definition
 7 is a practice that “offends an established public policy” or that “is immoral, unethical,
 8 oppressive, unscrupulous or substantially injurious to customers.” *Id.* An unfair practice may
 9 also be one in which “(1) the consumer injury is substantial; (2) the injury is not outweighed
 10 by any countervailing benefits to consumers or competition, and (3) the injury is one that
 11 consumers themselves could not reasonably have avoided.” *Morgan* at 1255. *See also*
 12 *Merchante v. Sony Corp. of America, Inc.*, 2011 WL 6027602 at *2 (S.D. Cal. Dec. 5, 2011).

13 Eckler pleads her UCL claim in all possible ways. Even though the coverage of the
 14 UCL has been described as “sweeping” and its standard for wrongful business conduct as
 15 “intentionally broad,” *In re First Alliance Mortg Co.*, 471 F.3d 977, 995 (9th Cir. 2006), this is
 16 somewhat confusing. The elements and factual bases of the varied claims aren’t necessarily
 17 identical, and yet Eckler makes no effort to plead the claims independently of one another.
 18 For example, under the “unlawful” prong of § 17200, Eckler alleges that the Equate
 19 representations at issue violate California’s False Advertising Law, Cal. Bus. and Prof. Code
 20 § 17500, as well as various provisions of the California Civil Code: § 1572 pertaining to actual
 21 fraud, § 1573 pertaining to constructive fraud, § 1709 pertaining to fraudulent deceit, § 1711
 22 pertaining to deceit to defraud the public, and § 1770 pertaining to unfair methods of
 23 competition and unfair or deceptive acts.⁵ (See FAC ¶ 38.) As for the “unfair” prong, Eckler

24
 25 ⁵ The problems with Eckler’s method of pleading are manifest. California Civil Code
 26 §§ 1572 and 1573 apparently deal with fraud in contracts, and they define fraud and
 27 constructive fraud in more ways than one. Section 1711 seems to require an intent to
 28 defraud, which Eckler doesn’t really allege with respect to Wal-Mart. (See Opp’n Br. at 8;
but see Reply Br. at 6 n.3.) Section 1770 defines twenty-four unfair methods of competition
 and deceptive acts, and Eckler doesn’t identify which Wal-Mart has allegedly engaged in.
 Finally, In the Court’s experience, violations of § 17500 are typically alleged as free-standing
 claims, rather than predicate violations of law that give rise to a § 17200 claim. (The False
 Advertising Law prohibits product statements that are untrue or misleading, and which are

1 asserts that Equate's representations offend an established public policy "against engaging
2 in false and misleading advertising, unfair competition and deceptive conduct towards
3 consumers." (FAC ¶¶ 40–41.) And as for the "fraudulent" prong, Eckler asserts that the
4 Equate representations are "false, misleading and/or likely to deceive the consuming public."
5 (FAC ¶ 44.)

6 To the Court, Eckler's UCL claim comes in under the UCL's "fraudulent" prong. The
7 core of the claim, after all, is that the representations at issue are false and misleading, and
8 likely to deceive the public. (See FAC ¶¶ 1–2, 3, 12, 23, 43–44.) Her opposition brief
9 confirms this in multiple places: (1) "To the contrary, the FAC alleges false and deceptive
10 advertising, specifically that Wal-Mart presented a uniform message on its Equate
11 Glucosamine product's packaging and advertising that Equate Glucosamine will provide
12 specific joint health benefits, when in fact it does not"; (2) "Wal-Mart casts Plaintiff's case as
13 something it is not — a 'lack of substantiation' case — rather than the false advertising case
14 that it is."; (3) "Plaintiff's UCL and CLRA false advertising claims are 'distinct from common
15 law fraud.'"; (4) "Plaintiff need only show that the advertising is 'likely to deceive' and need
16 not prove it is actually 'false.'" (Opp'n Br. at 1, 4, 7, 14.) The allegations that the
17 representations are "unlawful" and "unfair" appear for the first time when she actually
18 identifies her UCL claim, and seem to be thrown in just to plead the claim exhaustively.
19 Eckler does not, as the Court has noted, take care to specifically plead the elements of the
20 predicate, unlawful California Civil Code violations. Nor does she identify the established
21 public policy the alleged misrepresentations violate, or plead facts to suggest they are
22 immoral, oppressive, and substantially injurious to customers. *Twombly* is clear that "a
23 formulaic recitation of the elements of a cause of action" isn't enough to survive a motion to
24 dismiss, and yet that is precisely what Eckler gives Wal-Mart and the Court with respect to
25 a UCL claim based on "unlawful" and "unfair" practices. See *Twombly*, 550 U.S. at 555.
26 //

27 _____
28 known or should be known to be untrue or misleading. And ordinarily, a violation of the
UCL's fraud prong is also a violation of the False Advertising Law, at least where, as here,
the violations are premised upon the same conduct. See *Morgan*, 177 Cal.App.4th at 1259.

1 Because Eckler's UCL claim sounds in fraud, it is subject to the heightened pleading
2 standards of Fed. R. Civ. P. 9(b).⁶

3 Here, then, is how the Court sees this case. Equate represents that it is "[f]ormulated
4 to help [s]upport joint comfort [and] [r]ebuild cartilage and lubricate joints." Eckler alleges that
5 this representation is false and misleading, in light of the following studies ⁷:

6
7 ⁶ The parties make too much out of this question, which, in the Court's view, very little
8 turns on. Wal-Mart's argument for dismissal isn't that Eckler fails to plead fraud with
9 specificity, but that the representations at issue simply aren't false and misleading in the first
10 place.

11 Anyway, in federal court, "Rule 9(b)'s heightened pleading standards apply to claims
12 for violations of the CLRA and UCL." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th
13 Cir. 2009). (This is true even for UCL claims brought under the "unlawful" and "unfair"
14 prongs that allege fraudulent conduct. *Id.* at 1127.) The cases Eckler cites to the contrary
15 are either not good law in this Court or confuse the (correct) argument that UCL claims must
16 be pled with specificity with the (false) argument that the elements of common law fraud are
17 required to state a claim under the UCL. So, Wal-Mart is right about the applicability of Rule
18 9(b) here. See *Elias v. Hewlett-Packard Co.*, 2012 WL 4857822 at *8 (N.D. Cal. Oct. 11,
19 2012) (applying Rule 9(b) to UCL and FAL claims). The Court also notes that in *Cardenas*,
20 a virtually identical lawsuit brought in the Eastern District of California by Eckler's lawyers,
21 the court found that Rule 9(b) applied. See *Cardenas*, 2012 WL 1593196 at *8 ("Because
22 the alleged fraudulence of Defendants' advertising is inseparable from any other averments
23 made as part of Plaintiff's UCL claim, the court determines that Plaintiff's UCL claim, as a
24 whole, must meet the pleading standards of Rule 9(b).").

25 That said, all Rule 9(b) requires is that "a party . . . state with particularity the
26 circumstances constituting fraud or mistake." To satisfy this requirement, allegations of fraud
27 must be "specific enough to give defendants notice of the particular misconduct which is
28 alleged to constitute fraud charged so that they can defend against the charge and not just
deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th
Cir. 1985). In this case, Eckler has identified specific representations on the Equate
packaging that she believes are false and misleading, she has identified specific studies that
she believes shows why those representations are false and misleading, and she has
alleged when and where she bought the product and for how long Wal-Mart has been selling
it.

21 That seems an adequate offering of the "who, what, when, where, and how" of Wal-
22 Mart's alleged fraud as required. See *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106
23 (9th Cir. 2003); *Rosales v. FitFlop*, 2012 WL 3224311 at *4 (S.D. Cal. Feb. 8, 2012) (finding
24 UCL plaintiffs complied with Rule 9(b) by: (1) providing reproductions of defendant's product
advertisements and identifying the allegedly misleading language; (2) identifying the time
period of the product's advertising campaign; and (3) providing facts showing defendants
misrepresented the product's benefits).

25 ⁷ To be clear, Wal-Mart makes no representation that the purported benefits of Equate
26 have been clinically proven. That is why Eckler's reliance on *Rikos v. Proctor & Gamble Co.*
27 and *Morey v. NextFoods, Inc.* is misplaced. In *Rikos*, advertisements for the P&G product
28 at issue said its benefits were clinically proven, but the plaintiff alleged that P&G's clinical
trial was actually inconclusive. 782 F.Supp.2d 522, 527 (S.D. Ohio 2011). In *Morey*, too,
the product at issue claimed to be clinically proven to promote healthy digestion, but the
plaintiff alleged that the product had never been clinically tested. 2010 WL 2473314 at *1
(S.D. Cal. June 7, 2010).

- 1 • In 2006, a study funded by two divisions of the National Institutes of
2 Health—the National Center for Complementary & Alternative Medicine
3 and the National Institute of Arthritis and Musculoskeletal and Skin
4 Diseases—concluded that “[g]lucosamine and chondroitin sulfate alone
5 or in combination did not reduce knee pain effectively in the overall
6 group of patients with osteoarthritis of the knee.” This was known as the
7 Glucosamine/Chondroitin Arthritis Intervention Trial, or “GAIT” study.
8 The results were published in the New England Journal of Medicine in
9 2006. (See FAC ¶¶ 16.)
- 10 • In a 2008 follow up to the GAIT study, published in the journal Arthritis
11 and Rheumatism, researchers concluded that glucosamine and
12 chondroitin sulfate fared no better than a placebo in slowing the loss of
13 cartilage in osteoarthritis of the knee. (FAC ¶¶ 17.)
- 14 • A second follow-up to GAIT study, in 2010, reached the same
15 conclusions as the previous two studies. It found that neither
16 glucosamine or chondroitin fared better than a placebo in reducing knee
17 pain from osteoarthritis. (FAC ¶¶ 16 n.2.)
- 18 • The National Collaborating Centre for Chronic Conditions, affiliated with
19 the Royal College of Physicians in London, reported in a 2008
20 osteoarthritis study that “the evidence to support the efficacy of
21 glucosamine hydrochloride as a symptom modifier is poor” and the
22 “evidence for efficacy of chondroitin was less convincing.” (FAC ¶¶ 18.)
- 23 • A 2010 study by S. Wandel, “Effects of glucosamine, chondroitin, or
24 placebo in patients with osteoarthritis of hip or knee: network meta-
25 analysis,” concluded that “Compared with placebo, glucosamine,
26 chondroitin, and their combination do not reduce joint pain or have an
27 impact on narrowing of joint space.” (FAC ¶¶ 18.)
- 28 • A 2009 study by T. Towheed, “Glucosamine Therapy for Treating
Osteoarthritis,” concluded “there was no statistical difference between
glucosamine and placebo” for hip or knee osteoarthritis pain, function,
or stiffness. (FAC ¶¶ 18.)
- A 2008 study of MSM by S. Brien found no “definitive evidence that
MSM is superior to placebo in the treatment of mild to moderate OA of
the knee.”

22 The standard is the “reasonable consumer” test, “which requires a plaintiff to show that
23 members of the public are likely to be deceived by the business practice or advertising at
24 issue.” *Elias*, 2012 WL 4857822 at *9.

25 The first problem for Eckler, as Wal-Mart points out, is that none of these studies
26 actually involved Equate. As its packaging makes clear, Equate contains a number of
27 ingredients: Vitamin C; Vitamin D; Manganese; Sodium; Glucosamine, a proprietary blend of
28 Chondroitin Sulfate, Methylsulfonylmethane, Hydrolyzed Gelatin, Boswellia serrata, and

1 Hyaluronic Acid; and Boron. And it is that overall formulation that's behind the
 2 representations at issue.⁸ The second problem, which Wal-Mart also highlights, is that the
 3 studies Eckler cites are all *osteoarthritis* studies. Specifically, they looked at the impact of
 4 glucosamine, chondroitin, or MSM on the pain and loss of cartilage associated with
 5 osteoarthritis of the hip and knee. But Equate, according to Wal-Mart, doesn't represent that
 6 it will reduce the pain and cartilage loss associated with osteoarthritis. In fact, in two places
 7 the packaging states that the product "is not intended to diagnose, treat, cure, or prevent any
 8 disease." Wal-Mart argues that Eckler "cites no studies examining the effectiveness of the
 9 actual Product in providing the benefits actually represented on the Product label." (Mot. to
 10 Dismiss at 9.)

11 Eckler's response to this is that these are merits arguments that are premature in a
 12 motion to dismiss. That actually depends. First, it's not really arguing the merits to claim, as
 13 Wal-Mart does, that the studies on which Eckler relies didn't even test the actual formulation
 14 of Equate. If that's true, the studies simply wouldn't show what Eckler claims they do, and
 15 the Court would be left with no facts from which to infer that Wal-Mart is liable for false
 16 advertising. That's very relevant to the Court's consideration of Wal-Mart's motion to dismiss.
 17 And second, to the extent that Eckler wanted to frame the representation at issue as
 18 promising benefits "for all stages of joint disease," it goes straight to the question whether her
 19 claims have facial plausibility that a disclaimer explicitly says Equate isn't intended to cure or
 20 treat any disease.⁹ See *Iqbal*, 556 U.S. at 678. The cases on which Eckler relies to argue

21
 22 ⁸ Eckler explains in her opposition brief that "[t]he studies cited in the FAC involved
 23 the same ingredients in the same amounts as Equate Glucosamine and serve to establish
 24 that Wal-Mart's joint comfort, renewal and rejuvenation representations are false. For
 25 example, all but one of the studies cited in the FAC tested glucosamine hydrochloride (the
 primary ingredient in the Product) alone and in combination with other ingredients, and found
 that 1500 mg (the same amount in the Product) was ineffective at rebuilding cartilage,
 lubricating joints or supporting joint comfort." (Opp'n Br. at 7 n.7.) This is a critical point that
 should have been included in Eckler's complaint.

26 ⁹ Eckler argues in her opposition brief that her interpretation of the Equate
 27 representations—"Equate Glucosamine will provide the represented joint health benefits to
 28 all persons and for all manner and stages of joint disease"—is not concocted because
 "[t]here are no qualifications or limitations placed by Wal-Mart on its labeling or packaging
 as to whom may gain the joint health benefits represented on the front of the packages."
 (Opp'n Br. at 6.) It's hard to see how the statement "This product is not intended to

1 that a disclaimer shouldn't be considered with a motion to dismiss are arguably
2 distinguishable, too, because the disclaimer at issue in those cases appeared to directly
3 contradict other representations. See *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 n.9
4 (1st Cir. 2010) (A statement that studies prove a product cures a certain disease, followed by
5 a disclaimer that the statement is opinion and the product actually does not cure the disease,
6 leaves an overall impression of nonsense, not clarity."); *Johns v. Bayer Corp.*, 2010 WL
7 2573493 at *4 (S.D. Cal. June 24, 2010) (product claimed to reduce the risk of prostate
8 cancer while disclaimer said it was not intended to "diagnose, treat, cure, or prevent any
9 disease").

10 Ultimately, the Court cannot accept that the studies Eckler cites lend "facial plausibility"
11 to her claims that the Equate representations are false or misleading. See *Iqbal*, 556 U.S.
12 at 678. The studies allegedly show that glucosamine doesn't alleviate the symptoms of
13 osteoarthritis in the hip and knee. That is a very particular showing with respect to a
14 degenerative joint disease, and in the Court's judgment it doesn't address the far more
15 general claim—which *is* made by the Equate representations—that glucosamine is good for
16 the body's joints. Throughout her opposition brief Eckler conflates these two issues, pitching
17 a finding that Equate does little for the symptoms of osteoarthritis as a finding that it does
18 nothing for the body's joints at all. (See, e.g., Opp'n Br. at 1, 4.)

19 In fact, Equate is marketed as a dietary supplement that "help[s]" keep joints healthy.
20 And not only does the packaging state in two places that it's not intended to "diagnose, treat,
21 cure, or prevent any disease," it casts Equate as a curative for "[o]verexertion, the natural
22 aging process and everyday wear and tear," which is yet another way of making this point
23 clear. When false advertising claims do survive a motion to dismiss, by contrast, there is not
24 this kind of mismatch between the representations at issue and the evidence that allegedly
25 debunks them. In the *FitFlop* case in this district, for example, the product claimed to improve
26 posture, increase muscle activation and toning, and reduce joint strain, but a study by the
27 American Council on Exercise concluded that "wearing so-called fitness shoes will have no

28 _____
diagnose, treat, cure, or prevent any disease" is not a qualification or limitation.

1 beneficial effect on exercise intensity or caloric expenditure compared to wearing a regular
 2 running shoe. Additionally, there is no evidence that wearing shoes with an unstable shoe
 3 design will improve muscle strength and tone more than wearing a regular running shoe.”
 4 *See FitFlop*, Case No. 11-CV-973, Doc. No. 10 at ¶¶ 3, 5. 18–46. *See also Von Koenig v.*
 5 *Snapple Beverage Corp.*, 713 F.Supp.2d 1066, 1078 (E.D. Cal. May 10, 2010) (challenging
 6 “All Natural” representation on Snapple bottles in light of the fact that they contained high
 7 fructose corn syrup).

8 In light of the above, Wal-Mart’s motion to dismiss Eckler’s UCL claim is **GRANTED**.
 9 The Court doesn’t consider whether that claim can be adequately pled on a “failure to disclose”
 10 theory because Eckler disavowed any such claim in her opposition brief. (Opp’n Br. at 4 n.2.)

11 **B. CLRA Claim**

12 There is no need to separately address Eckler’s CLRA claim. The standard for a
 13 CLRA claim is the same as the standard for a UCL claim, and the above analysis therefore
 14 applies. *See Elias*, 2012 WL 4857822 at *9 (addressing CLRA, FAL, and UCL fraud claim
 15 together because “[t]he standard for all three statutes is the ‘reasonable consumer’ test,
 16 which requires a plaintiff to show that members of the public are likely to be deceived by the
 17 business practice or advertising at issue”). Wal-Mart’s motion to dismiss the claim is
 18 **GRANTED**.

19 **C. Breach of Warranty Claim**

20 Wal-Mart attacks Eckler’s breach of warranty claim, first, for her failure to give notice
 21 of it before she sued. Eckler’s response is that she gave notice when she served Wal-Mart
 22 with the original complaint in this case, and that this “post-filing” notice was reasonably timely.
 23 Eckler is wrong.

24 “To avoid dismissal of a . . . breach of warranty claim in California, ‘a buyer must plead
 25 that notice of the alleged breach was provided to the seller within a reasonable time after
 26 discovery of the breach.’” *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011)
 27 (quoting *Stearns v. Select Comfort Retail Corp.*, 763 F.Supp.2d 1128, 1142 (N.D. Cal. 2010)).
 28 But more important, this notice requirement “means pre-suit notice.” *Id.* The *Alvarez* opinion

1 couldn't have been more clear about this: "We therefore must conclude that Plaintiffs failed
2 to plead that they provided reasonable notice under § 2607(3)(A) because their notice letter
3 was sent to Defendants simultaneously with service of the complaint." *Id.* Were Eckler to get
4 her way, were it adequate to provide notice post-suit, it would completely defeat the purpose
5 of the notice requirement, which is to "allow the breaching party to cure the breach and
6 thereby avoid the necessity of litigating the matter in court." *Id.*

7 Wal-Mart's motion to dismiss Eckler's breach of warranty claim is **GRANTED**.

8 **IV. Conclusion**

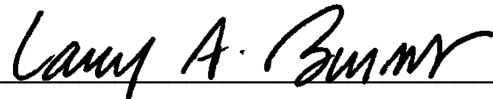
9 Each of Eckler's claims is **DISMISSED**. The breach of express warranty claim is
10 **DISMISSED WITH PREJUDICE**. The UCL and CLRA claims are **DISMISSED WITHOUT**
11 **PREJUDICE AND WITH LEAVE TO AMEND**. Rule 15 of the Federal Rules of Civil
12 Procedure mandates that leave to amend "be freely given when justice so requires." Fed. R.
13 Civ. P. 15. "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v.*
14 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). *See also Foman v. Davis*, 371 U.S. 178,
15 182 (1962) (implying leave to amend should be granted in the absence of undue delay, bad
16 faith or dilatory motive, or undue prejudice to the opposing party or futility of amendment).
17 The Court also grants Eckler leave to amend mindful that the Ninth Circuit has recognized
18 that "whether a business practice is deceptive will usually be a question of fact not
19 appropriate for decision on demurrer." *Williams v. Gerber Products Co.*, 552 F.3d 934, 938
20 (9th Cir. 2008).

21 Eckler should keep the following in mind if she files an amended complaint, which she
22 must do with two weeks of the date this order is entered. First, her UCL claim needs to
23 cleaned up. As the Court suggested above, it reads Eckler's complaint as truly pleading a
24 fraud-based UCL claim. If, however, she also intends to plead a UCL claim based upon
25 unlawful and unfair conduct, she must do more than simply say so. (See, e.g., FAC ¶ 38.)
26 The Court isn't suggesting that each UCL claim be asserted as an independent cause of
27 action, but it is suggesting that Eckler pay closer attention to any elemental or factual
28 differences between the different UCL claims she might plead. Second, to the extent Eckler's

1 false advertising claims turns on her own experience with Equate, rather than studies that
 2 show it doesn't deliver the joint benefits it suggests, she needs to say far more than, in
 3 essence, "I took Equate and didn't feel any better." (See FAC ¶ 9.) And third, Eckler needs
 4 to do more to explain why the studies she cites regarding glucosamine and osteoarthritis
 5 contradict the actual representations at issue.¹⁰ That continues to be the Court's biggest
 6 problem with her complaint. What do studies showing that glucosamine doesn't alleviate the
 7 symptoms of osteoarthritis in the hip and knee have to do with the representations of a dietary
 8 supplement, explicitly *not* intended to treat a disease, that it is formulated to support joint
 9 comfort, rebuilt cartilage, and lubricate joints? The Court won't commit to a final ruling on this
 10 issue should Eckler file an amended complaint, but she should at least know where the Court
 11 stands now.

12 **IT IS SO ORDERED.**

13 DATED: October 31, 2012



HONORABLE LARRY ALAN BURNS
 United States District Judge

23 ¹⁰ The Court is well aware that Eckler's lawyers' complaint in *Cardenas*, the Osteo Bi-
 24 Flex case, survived a motion to dismiss—although it notes that the complaint in *Cardenas*
 25 alleged simply that "clinical cause and effect studies have found no causative link between
 26 supplementation and joint renewal or rejuvenation." Case No. 11-CV-1615 (E.D. Cal.), Doc.
 27 No. 25 at ¶ 21. The complaint didn't identify the particulars of the studies, and had it, this
 28 may have led the court to reach a different conclusion than it did. It certainly bothers the
 Court here that there is a disconnect between the representations at issue and what the
 studies cited by Eckler actually show. Moreover, it's not necessarily a merits issue that the
 Court should pass on. If the disconnect is as wide as the Court suspects, Eckler's claims
 may be wholly speculative and the Court may not be able to reasonably infer that Wal-Mart
 has engaged in false or deceptive advertising on the basis of the facts alleged. And that
 means dismissal is proper.